RECENT AMERICAN DECISIONS.

Court of Chancery of New Jersey.

WILLIAM M. DAVIS *v.* JOSEPH HOWELL.

On marshalling the assets of both partnership and individual estates, under separate assignments for the benefit of creditors, the partnership creditors are not entitled, after exhausting the partnership assets, to resort to the individual assets until after the individual creditors' claims have been satisfied.

BILL for relief. On final hearing on bill and answer.

J. F. Dumont, for complainant.

G. M. Shipman and *J. G. Shipman*, for answering defendants.

RUNYON, Chancellor.—John C. Bennett and James M. Andrews were, on or about the 10th of February 1876, partners in business in Phillipsburg. On that day they made an assignment under the Assignment Act, for the equal benefit of their creditors, to the complainant, William M. Davis. Five days after the making of that assignment Andrews made an assignment, under the Act, for the equal benefit of his creditors, to the complainant and Joseph Howell, and about the same time Bennett made a like assignment to Sylvester A. Comstock and Charles F. Fitch. The partnership estate will pay a dividend of only about eleven per cent. of the partnership debts. Most of the partnership creditors have put in their claims under the assignment of Andrews, and claim and insist upon a proportionate participation with his individual creditors therein as to so much of their claims as may not be paid out of the partnership estate, and they threaten the complainant and his co-assignee of Andrews's estate with legal proceedings if their demand be not complied with. The complainant therefore comes into this court for protection and instructions as to his duty in the premises. His co-assignee, Howell, is a creditor of Andrews's estate, and he is made a defendant.

The question presented has been often discussed, and, though there exists some contrariety of judicial determination upon it, must be considered as settled by the great weight of authority. The rule is laid down in the text-books that joint debts are entitled to priority of payment out of the joint estate, and separate debts out of the separate estate: Story's Eq. Jur., sect. 675; Snell's Prin. of Eq. 419; Story on Part., sect. 376; Kent's Com. 64, 65; Parsons on Part. 480. And though the propriety of the rule has been often and persistently questioned on the ground that

it is a violation of principle, and devoid of equity, and was originally adopted from considerations of convenience only, and in bankruptcy cases, and not on principles of general equity, yet it is so firmly established that it must be regarded as a fixed rule of equity. Its history is so well known, and has been so often stated, that it is profitless to repeat it. It was declared in 1715, in *Ex parte Crowder*, 2 Vern. 706; it was affirmed by Lord HARDWICKE, and though Lord THURLOW refused to follow it, it was restored by Lord LOUGHBOROUGH and followed by Lord ELDON, and it has existed ever since in the English chancery. It has an exception where there is no joint estate and no solvent partner. But where there is any joint estate the rule is to be applied. That part of the rule which gives the joint creditors a preference upon the joint estate has been repeatedly recognised in this state: *Cammack* v. *Johnson*, 1 Gr. Ch. 163; *Matlack* v. *James*, 2 Beas. 126; *Mittnight* v. *Smith*, 2 C. E. Gr. 259; *Scull* v. *Alter*, 1 Harr. 147; *Curtis* v. *Hollingshead*, 2 Gr. 402; *Brown* v. *Bissett*, 1 Zab. 46; *Linford* v. *Linford*, 4 Dutch. 113. In *Scull* v. *Alter* the Supreme Court recognised the rule in all its parts. Chief Justice HORNBLOWER, by whom the opinion of the court was delivered (the question arose under an assignment under the Assignment Act, and was the same as is presented in this case), said: "But if it is an assignment not only of the partnership effects and property of the firm of Carhart & Britton, but also an individual and several assignment by them of their respective and several estates, then it must be treated as such. The estates and debts must be marshalled; the partnership effects applied in the first instance to the partnership debts; the effects of Carhart applied in the first instance to the payment of his separate debts, and in like manner the effects of Britton to the payment of debts due from him individually."

In Connecticut the rule is not followed, and that part of it which gives the separate creditors a preference upon the separate estate has been repudiated: *Camp* v. *Grant*, 21 Conn. 41. It has been repudiated also in certain other states; *Bardwell* v. *Perry*, 19 Vt. 292; *Emanuel* v. *Bird*, 19 Ala. 596. But the doctrine is recognised elsewhere, and has been established after thorough discussion and careful consideration. In *Wilder* v. *Keeler*, 3 Paige 167, Chancellor WALWORTH, after a full discussion of the subject, gives the sanction of his weighty opinion to the rule as a doctrine of equity. He says: "In the case now under consideration there was, at the death of G. F. Lush, a large joint fund belonging to

the partnership, out of which the joint creditors were entitled to a priority of payment, and out of which several of the joint creditors who have come in under this decree, have actually secured a portion of their debts. Nothing but an unbending rule of law should, under such circumstances, induce the court to permit them to come in for the residue of their debts, ratably, with the separate creditors. The amount of the fund which will remain after paying the separate creditors being a fund which could not be reached at law by the joint creditors whose remedy survived against the surviving partner alone, must be considered in the nature of equitable assets, and must be distributed among the joint creditors, upon the principle of this court that equality is equity." The doctrine was recognised in *Morgan* v. *Skidmore*, 55 Barb. 263. In Pennsylvania in *Bell* v. *Newman*, 5 S. & R. 78, 91, 92, GIBSON (afterwards Chief Justice), in a dissenting opinion, strongly supports the rule as one founded on the most substantial justice. In *Black's Appeal*, 44 Penn. St. 503, and again in *McCormack's Appeal*, 55 Penn. St. 252, the doctrine is completely recognised and affirmed. In South Carolina, in *Woddrop* v. *Price*, 3 Dessaus. 203; *Tunno* v. *Trezevant*, 2 Id. 264, and *Hall* v. *Hall*, 2 McCord's Ch. 269, the doctrine was held to be a doctrine of equity. In Massachusetts it is established by statute. In *Murrill* v. *Neill*, 8 How. 414, it is recognised by the Supreme Court of the United States.

The objection that is always pressed as the conclusive argument against it is, that partnership debts are several as well as joint, and it is urged that therefore the partnership creditor has an equal claim upon the individual estate with the separate creditor. But it is beyond dispute that in equity the former has a preferred claim upon the partnership estate. To accord to him an equal claim as to the balance of his debt, which the partnership assets may not be sufficient to satisfy, with the individual creditor, would be to give him an advantage to which he is not equitably entitled. If he obtains a legal lien on the separate estate, he will not be deprived of it: *Wisham* v. *Lippincott*, 1 Stock. 353; *Randolph* v. *Daly*, 1 C. E. Gr. 313; *National Bank* v. *Sprague*, 5 Id. 13; *Howell* v. *Teel*, 2 Stew. Eq. 490. But if he has no such lien, and the assets are to be marshalled in equity, that same equitable doctrine by which the partnership assets are devoted in the first place to the payment of his debt to the exclusion of the separate creditor, and to which he is indebted for the preference, will, in like manner

and for like reason, give the latter preference upon the separate property. Such was the view of Chancellor KENT. He says: "So far as the partnership property has been acquired by means of partnership debts, those debts have, in equity, a priority of claim to be discharged, and the separate creditors are only entitled in equity to such payment from the surplus of the joint fund after satisfaction of the joint debts. The equity of the rule, on the other hand, equally requires that the joint creditors should only look to the surplus of the separate estates of the partners after payment of the separate debts. It was a principle of the Roman law, and it has been acknowledged in the equity jurisprudence of Spain, England and the United States, that partnership debts must be paid out of the partnership estate, and private and separate debts out of the private and separate estate of the individual partner:" 3 Kent's Com. 64, 65. The obvious infirmity of the objection to the rule is, that it leaves out of consideration the fact that it is to equity that the joint creditor is indebted for his preference. It is also urged that instead of the rule, it would be more equitable to require the joint creditor to have recourse to the partnership property before allowing him to participate in the separate estate, on the equitable ground that he has two funds for the payment of his debt, while the separate creditor has but one; but the rule as established is a rule of justice and equity. It has for its basis the presumption that joint debts have been contracted on the credit of the joint estate, and separate debts on that of the separate estate. It has the weight of great authority and long establishment, notwithstanding persistent objection and some fluctuation, and it is based on equitable principles. Sound policy is in its favor. Though there may be, as there is in the case of all such rules, instances in which it works unsatisfactorily, yet that on the whole, and as a rule, it has not operated unjustly, is evidenced by the fact that it has existed so long (*Ex parte Crowder* was decided in 1715), notwithstanding opposition, and that in Massachusetts, at least, it has, in the face of the opposition referred to, been established by legislative authority, and that, too, as lately as 1838. In this state it has, as has been shown, the sanction of our judicial tribunals, and it is too firmly established to be disturbed. It is true that in *Wisham* v. *Lippincott*, 1 Stock. 353, 356, the chancellor expressed strong doubt of its correctness, as a general rule; but in the other cases before cited, both previous and subsequent,

the rule has been recognised without any expression of disapprobation or dissatisfaction.

There will be a decree that the joint assets be first applied to the payment of the joint debts, and the separate assets to the separate debts, and that the joint creditors may participate in any surplus of the separate assets which may remain after payment of the separate debts. The costs of the parties will be paid out of the funds represented by the complainant—the partnership estate—and Andrews's estate in equal shares.

The settlement of debts is a subject which is rendered complicated in the law by the relation of partnership. It is a mere truism to say that the subject is a very important one, so general is the relationship, and so extensive the dealings of persons who stand in that relationship. It is hoped that the following review of the authorities will not be without interest as recalling the general principles which control in such cases.

1. The *corpus* of the effects of a partnership is joint property. Neither partner separately has anything in that *corpus*, but the interest of each is only his share, in accordance with the partnership agreement, of what remains after the partnership debts are paid and the accounts are taken: *West* v. *Skip*, 1 Ves. 239; *Fox* v. *Hanbury*, Cowp. 445; *Taylor* v. *Fields*, 4 Ves. 396; *Witter* v. *Richards*, 10 Conn. 37; *Beecher* v. *Stevens*, 43 Id. 587; *Pierce* v. *Jackson*, 6 Mass. 243; *Place* v. *Sweetzer*, 16 Ohio 142; *Hurley* v. *Walton*, 63 Ill. 260; *Taft* v. *Schwamb*, 80 Id. 289; *Williams* v. *Gage*, 49 Miss. 777; *Gaines* v. *Coney*, 51 Id. 323; *California Furniture Co.* v. *Halsey*, 54 Cal. 315, 317; *Matlock* v. *Matlock*, 5 Ind. 403; *Swallow* v. *Thomas*, 15 Kans. 69; *Hall, Admr.*, v. *Clagett*, 48 Md. 223; *Menagh* v. *Whitwell*, 52 N. Y. 146, 158; *Meily* v. *Wood*, 71 Penn. St. 488; *Staats* v. *Bristow*, 73 N. Y. 264.

2. The partners have a lien on the partnership property for the payment of the partnership debts, and for the surplus due to each partner after the settlement of the partnership liabilities; but the creditors, as such, have no lien upon the partnership property, and must work out their rights through the equities of the partners: *Rice* v. *Barnard*, 20 Vt. 479; *Freeman* v. *Stewart*, 41 Miss. 139; *Sigler* v. *Knox County Bank*, 8 Ohio St. 511; *Hawk Eye Woollen Mills* v. *Conklin*, 26 Iowa 422; *O'Bannon* v. *Miller*, 4 Barb. 25; *Ransom* v. *Van Deventer*, 41 Barb. 313; *Menagh* v. *Whitwell*, 52 N. Y. 146; *Cope's Appeal*, 39 Penn. St. 284; *Houseal's Appeal*, 45 Id. 485; *Foster* v. *Barnes*, 81 Id. 377; *Day* v. *Wetherby*, 29 Wis. 363; *Fain* v. *Jones*, 3 Head 308; *Case* v. *Beauregard*, 99 U. S. 119; *Campbell* v. *Mullett*, 2 Swanston's Ch. 550, 570; *Ex parte Ruffin*, 6 Ves. 119.

3. The principle is well settled that because of this lien of the partners, the firm's debts must be paid out of the firm's assets before the personal debts of the individual members of the firm can be paid therefrom: *Pease* v. *Rush*, 2 Minn. 112; *Chase* v. *Steel*, 9 Cal. 64; *Bullock* v. *Hubbard*, 23 Id. 501; *Lucas* v. *Atwood*, 2 Stew. (Ala.) 378; *Bridge* v. *McCullough's Admr.*, 27 Ala. 661; *Camp* v. *Mayer*, 47 Ga. 414; *Filley* v. *Phelps*, 18 Conn. 300; *Clark* v. *Allee*, 3 Harr. (Del.) 80; *Conant* v. *Frary*, 49 Ind. 530; *Cox* v. *Russell*, 44 Iowa 560; *Roberts* v. *Oldham*, 63 N. C. 298; *French* v. *Lovejoy*, 12 N. H. 458; *Bass* v. *Estill*, 50 Miss. 300; *Williams* v. *Gage*, 49 Id. 777; *Phelps* v. *McNeely*,

66 Mo. 558; *Frow, Jacobs & Co.'s Estate*, 73 Penn. St. 459; *Carper* v. *Hawkins*, 8 W. Va. 291; *Converse* v. *McKee*, 14 Texas 30; *Johnson* v. *King*, 6 Hum. 233; *Christian* v. *Ellis*, 1 Gratt. 396; *Washburn* v. *Bellows Falls Bank*, 19 Vt. 278.

4. The right of creditors to be first paid out of the firm's assets being a right derived through the equities of the partners and dependent upon these equities, it follows that if the partners waive their equities and consent to the appropriation of the firm's assets to the payment of a personal debt of an individual member of the firm, no one can raise objection thereto, the firm being solvent: *Schmidlapp* v. *Currie*, 55 Miss. 597; s. c., 18 Am. Law Reg. (N. S.) 108; *National Bank* v. *Sprague*, 20 N. J. Eq. 14; *Carter* v. *Beaman*, 6 Jones Law 44; *Marks* v. *Hill*, 15 Gratt. 400; *Mayer* v. *Clark*, 40 Ala. 259; *Reeves* v. *Ayers*, 38 Ill. 418; *Jones* v. *Lusk*, 2 Met. (Ky.) 362.

(*a*) But without the assent of the copartners the partnership assets cannot be applied to the individual debt of one of the members: *Todd* v. *Lorah*, 75 Penn. St. 155; *Corwin* v. *Suydam*, 24 Ohio St. 209; *Atkin* v. *Berry*, 1 B. J. Lea 91; *Perry* v. *Butt*, 14 Ga. 699; *Filley* v. *Phelps*, 18 Conn. 300; *Lanier* v. *McCabe*, 2 Fla. 32; *Furman* v. *Fisher*, 4 Coldw. 626; *Smith* v. *Andrews*, 49 Ill. 28; *Caldwell* v. *Scott*, 54 N. H. 414; *Flanagan* v. *Alexander*, 50 Mo. 50; *Ross* v. *Henderson*, 77 N. C. 172; *Blodgett* v. *Sleeper*, 67 Me. 500; *Williams* v. *Barnett*, 10 Kans. 455; *Hamilton* v. *Hodges*, 30 La. Ann. 1290.

(*b*) When the separate credit or of a partner takes partnership property in payment of his debt, knowing at the time that it is partnership property, he acquires no rights therein as against the partnership, and it may be recovered back, the copartners not having assented to such an appropriation: *Mix* v. *Muzzy*, 28 Conn. 190; *Moriarty* v. *Bailey*, 46 Id. 592; *Major* v. *Hawkes*, 12 Ill. 298; *Ross* v. *Henderson*, 77 N. C. 172; *Daniel* v. *Daniel*, 9 B. Monr. 196.

(*c*) And the partnership property may be recovered back, although the creditor did not know that the funds belonged to the partnership, provided he has parted with no security which he previously held: *Moriarty* v. *Bailey*, 46 Conn. 592. See, too, *Ackley* v. *Staehlin*, 56 Mo. 558.

(*d*) But the doctrine is generally laid down more broadly, to the effect that the transfer passes the title as against the partnership and its creditors, provided the separate creditor acted in good faith and without notice that the property belonged to the partnership: *Locke* v. *Lewis*, 124 Mass. 1; *Wiley* v. *Allen*, 26 Ga. 568.

(*e*) The knowledge and assent of the partners to the application of partnership property to the payment of the separate debt must be clearly shown: *Wise* v. *Copley*, 36 Ga. 508. See *Darling* v. *March*, 22 Me. 184; *Blodgett* v. *Sleeper*, 67 Id. 500; *Keith* v. *Fink*, 47 Ill. 272.

(*f*) It has been held that partnership assets cannot be applied, even with consent of copartners, to the payment of the individual debt of a partner, if the firm is insolvent. The reason upon which the principle is based, being that insolvent partners are to be considered as holding their joint property for the benefit of their joint creditors, and that a misappropriation is to be deemed in fraud of the implied trust. That a division by partners of copartnership assets under such circumstances, and a transfer of such assets by individual partners in payment of individual debts, is a fraud upon firm creditors, and it is, therefore, held that such transfer is invalid until the property comes to the hands of a *bonâ fide* purchaser for a new and valuable consideration: *Menagh* v. *Whitwell*, 52 N. Y. 146, 153, 161, 162; *Ransom* v. *Van Deventer*, 41 Barb. 307. And see *Burtus* v. *Tisdall*, 4 Barb. 580; *Wilson* v.

Robertson, 21 N. Y. 587; *Saloy* v. *Albrecht*, 17 La. Ann. 75; *Flack* v. *Charron*, 29 Md. 311. See, too, *Schmidlapp* v. *Currie*, 55 Miss. 597; s. c., Am. Law Reg. (N. S.) 108; where it is said that an appropriation to pay individual debts may be made with assent of copartners, where the firm "is neither bankrupt nor contemplating bankruptcy," and where there is a *bonâ fide* consideration therefor. But in *Marks* v. *Hill*, 15 Gratt. 400, it is asserted that such appropriation may be made, although the partnership is unable to pay its firm debts.

5. By the transfer of the joint property to his co-partner, and taking his personal contract and security for the payment of the joint debts, the partner loses his lien, the agreement of the copartner being substituted therefor, and the property becomes the separate property of such co-partner, who is entitled to use it as such: *Ex parte Ruffin*, 6 Vesey 119; *Howe* v. *Lawrence*, 9 Cush. 555, 558; *Dimon* v. *Hazard*, 32 N. Y. 65; *Menagh* v. *Whitwell*, 52 N. Y. 146, 160; *Hapgood* v. *Cornwell*, 48 Ill. 64; *Case* v. *Beauregard*, 99 U. S. 119; *Kimball* v. *Thompson*, 13 Met. 283; *Robb* v. *Mudge*, 14 Gray 534; *Baker's Appeal*, 21 Penn. St. 76; *Wilcox* v. *Kellogg*, 11 Ohio 394; *Vosper* v. *Kramer*, 31 N. J. Eq. 420; *Andrews* v. *Mann*, 31 Miss. 322; *Rankin* v. *Jones*, 2 Jones (N. C.) Eq. 169; *City of Maquoketa* v. *Willey*, 35 Iowa 323; *Smith* v. *Edwards*, 7 Hum. 106; *Allen* v. *Centre Valley Co.*, 21 Conn. 130; *Croone* v. *Bivens*, 2 Head 339. But see *Rogers* v. *Nichols*, 20 Tex. 726; *Tenney* v. *Johnson*, 43 N. H. 144; *Phelps* v. *McNeely*, 66 Mo. 558; *Flanagan* v. *Alexander*, 50 Id. 50; *Succession of Beer* v. *Goodman*, 12 La. Ann. 698.

6. As partnership creditors have no lien in their own right upon the partnership property, but work out their preference solely through the equity of the partners, do the partnership creditors lose their rights to a priority, supposing each partner transfers his interest to a third party? For instance, A., B. & C. are in partnership. The partnership property amounts to $300,000, and the partnership debts to $150,000. A. sells out his interest to D., who would take $50,000, as the partnership creditors still had a lien through the equities of the remaining partners. But before the creditors have exercised their right to levy on the firm's property, the interests of B. and C. are sold to E. Now, it has been claimed that at this point each partner has lost his lien, and that the lien of the partners being gone, the right of the partnership creditors to the payment of their debts out of the property was gone also. That being the case, D.'s share in the property would be at once changed from $50,000 to $100,000. Mr. Justice GIBSON was of the opinion in *Coover's Appeal*, 29 Penn. St. 9, that by this last sale, the property of the firm would be relieved from partnership debts, and that the share first sold would be at once changed from an interest in the surplus to a share in the *corpus* of the property free from debts. There was nothing in the case which made necessary the expression of such an opinion, and it must be regarded as an *obiter dictum*. But the question came up fairly in New York not long since in *Menagh* v. *Whitwell*, 52 N. Y. 146, and a conclusion reached contrary to the opinion expressed in *Coover's Appeal*. It was held that the equity of the partners was not lost, and that the property was still subject to the payment of the partnership debts. The question is certainly a nice one, and future adjudications in reference to it will be awaited with interest. But the rule seems to be settled in Pennsylvania in accordance with the opinion expressed in *Coover's Appeal*, that when the partners have lost dominion of the partnership property by a sale of their interests, the equity of creditors whose liens had not actually attached is thereby destroyed: *McNutt* v. *Strayhorn*, 39 Penn. St. 269; citing

Doner v. *Stauffer*, 1 P. & W. 198; *Kelly's Appeal*, 4 Harris 59; *Baker's Appeal*, 9 Id. 77; *Coover's Appeal*, *supra*. And in this connection the opinion of Justice STRONG, as expressed recently in *Case* v. *Beauregard*, 99 U. S. 119, is important. "If, before the interposition of the court is asked," so he says, "the property has ceased to belong to the partnership, if by a bona fide transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end. It is, therefore, always essential to any preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced."

7. It has been held that where a partnership is composed of two or more firms, the creditors of one of the firms are entitled to a preference in payment of their debts, over creditors of the whole partnership: *Bullock* v. *Hubbard*, 23 Cal. 495.

8. But where the same partners carry on the same business at different places under different partnership names, the creditors holding claims nominally against one firm are not entitled to be first paid out of the assets held under that firm name, but the assets of both nominal firms are equally applicable to the payment of all the creditors of both: *In re Vetterlein*, 5 Benedict 311; *In re Williams*, 3 Wood 493. See *Buckner* v. *Calcote*, 28 Miss. 432, 586, 587, to same effect.

9. And partnership debts must be paid before the debts of a former partnership, of which one of the present firm was a member: *Camp* v. *Mayer*, 47 Ga. 414; *Hurlburt* v. *Johnson*, 74 Ill. 64.

10. In equity, the real property acquired by a partnership for partnership purposes is regarded as personal estate so far as payment of partnership debts is concerned, and also as regards the adjustment of all partnership rights: *Little* v. *Snedecor*, 52 Ala. 167; *Caldwell* v. *Parmer*, 56 Ala. 405; *Dupuy* v. *Leavenworth*, 17 Cal. 262; *Drewry* v. *Montgomery*, 28 Ark. 256; *Lowe* v. *Lowe*, 13 Bush 688; *Galbraith* v. *Gedge*, 16 B. Mon. 633; *Foster* v. *Barnes*, 81 Penn. 377; *Williamson* v. *Fontain*, 7 Baxter 212; *Beecher* v. *Stevens*, 43 Conn. 587; *Rammelsberg* v. *Mitchell*, 29 Ohio. St. 22; *Hogle* v. *Lowe*, 12 Nev. 286; *Arnold* v. *Wainwright*, 6 Minn. 358; *Faulds* v. *Yates*, 57 Ill. 416; *Hewitt* v. *Rankin*, 41 Iowa 35; *Roberts* v. *McCarty*, 9 Ind. 16. At law, however, the title is vested in the several partners as tenants in common: *Wood* v. *Montgomery*, 60 Ala. 500.

11. The weight of authority seems to be in favor of the proposition that partners cannot claim an individual exemption in the partnership property, the property having been levied upon for a debt of the firm before the claim to an exemption was asserted: *Pond* v. *Kimball*, 101 Mass. 105; *Billingsley* v. *Spencer*, 64 Mo. 355; *Gaylord* v. *Imhoff*, 26 Ohio St. 317; *Guptil* v. *McFee*, 9 Kans. 30; *Giovanni* v. *First Nat. Bank of Montgomery*, 55 Ala. 307, overruling 50 Ala. 47, and Id. 251; also, 51 Ala. 177; *In re Handlin*, 3 Dillon 290; *Bonsall* v. *Comly*, 44 Penn. St. 442, 447; *Wise* v. *Frey*, 7 Neb. 134; *Russell* v. *Lennon*, 39 Wis. 570; *Love* v. *Blair*, Sup. Ct. of Indiana, March 1881. See *Harris* v. *Visscher*, 57 Ga. 229, 231. *Per contra*: *Stewart* v. *Brown*, 37 N. Y. 350; *Radcliff* v. *Wood*, 25 Barb. 52; *In re Young*, 3 Bank Reg. 440; *In re Rupp*, 4 Id. 95; *In re McKercher*, 8 Id. 409.

(*a*) In North Carolina, it is held that a partner is entitled to an exemption out of the partnership property, provided all the partners assent thereto: *Burns* v. *Harris*, 67 N. C. 140.

(*b*) In *Wise* v. *Frey*, 7 Neb. 134, a distinction is taken, and the opinion is expressed that when the judgment was against the partner in his individual ca-

pacity, he would be entitled to claim his exemption out of his share of the partnership effects. See *Servanti* v. *Lusk*, 43 Cal. 238; *Newton* v. *Howe*, 29 Wis. 536.

(*c*) A homestead cannot be carved out of partnership property: *Terry* v. *Berry*, 13 Nevada 515.

12. In equity, partnership debts are joint and several: *Wisham* v. *Lippincott*, 1 Stock. (N. J.) 354; *Tillyaw* v. *Laverty*, 3 Fla. 72; *Strong* v. *Niles*, 45 Conn. 52; *Haralson* v. *Campbell*, 63 Ala. 278; *Kent* v. *Wells*, 21 Ark. 411; *Silverman* v. *Chase*, 90 Ill. 37; *Freeman* v. *Stewart*, 41 Miss. 138; *Irby* v. *Graham*, 46 Miss. 427; *Hilliker* v. *Francisco*, 65 Mo. 604.

13. Upon the death of one of the partners, the survivor is entitled to the possession of the partnership assets, which he holds in trust for the payment of the partnership debts: *Robertshaw* v. *Hanway*, 52 Miss. 713; *Bassett* v. *Miller*, 39 Mich. 133; *Miller* v. *Jones*, 39 Ill. 54; *Shields* v. *Fuller*, 4 Wis. 102; *Wilson* v. *Soper*, 13 B. Monr. 517; *Glass* v. *Ludlum*, 8 Kans. 48; *Price* v. *Hicks*, 14 Fla. 565; *Costley* v. *Wilkerson*, 49 Ala. 210: *Strange* v. *Graham*, 56 Ala. 614; *Hanna* v. *Wray*, 77 Penn. St. 27.

(*a*) If the surviving partner does not account within a reasonable time, equity will enjoin him from acting and appoint a receiver: *Nelson* v. *Hayner*, 66 Ill. 487.

(*b*) The surviving partner is not entitled to any compensation for winding up the business of the firm and attending to the payment of its debts: *Gyger's Appeal*, 62 Penn. St. 73; *Brown* v. *McFarland*, 41 Id. 129; *Piper* y. *Smith*, 1 Head 93.

(*c*) He is entitled to give a preference to a particular creditor of the firm as against the other creditors of the firm: *Wilson* v. *Soper*, 13 B. Monr. 417; *Loeschigk* v. *Hatfield*, 51 N. Y. 660; *Roach* v. *Brannon*, 57 Miss. 500, where it is said: "He is the legal owner of the entire assets, and a firm creditor who has received nothing, has no more right to complain that some other *bona fide* firm creditor has been paid in full, than the individual creditor of an ordinary person would have under the same circumstances."

14. The earlier cases held that there must be an insolvency of the surviving partner, before a partnership creditor could reach the estate of the deceased partner for the payment of his debt: *Cowell* v. *Sikes*, 2 Russ. 191; *Campbell* v. *Mullett*, 2 Swanst. 574; *Ex parte Kendall*, 17 Vesey 514; *Pendleton* v. *Phelps*, 4 Day (Conn.) 481; *Alsop* v. *Mather*, 8 Conn. 587.

But it has been subsequently laid down that the creditor can elect to proceed against the estate of the deceased partner, without regard to the state of the firm assets: *Devaynes* v. *Noble*, 1 Meriv. 529; *Wilkinson* v. *Henderson*, 1 Myl. & K. 582; *Freeman* v. *Stewart*, 41 Miss. 138; *Mason* v. *Tiffany*, 45 Ill. 392; *Silverman* v. *Chase*, 90 Ill. 37; *Fillyau* v. *Laverty*, 3 Fla. 72; *Camp* v. *Grant*, 21 Conn. 41.

In New York, the rule is that the creditor must show an inability to collect his debt from the surviving partner: *Voorhis* v. *Childs*, 17 N. Y. 354; *Richter* v. *Poppenhausen*, 42 N. Y. 373; *Pope* v. *Cole*, 55 N. Y. 126.

15. The effect of the bankruptcy of one co-partner is to dissolve the firm, and to render the solvent members of the firm and the assignee of the bankrupt tenants in common of the partnership effects: *Halsey* v. *Norton*, 45 Miss. 703. Hence the rule is, that after one member of a firm has been adjudged a bankrupt, and has executed an assignment to his assignee, the solvent partner and such assignee must join in an action to collect a claim due to the firm: *Graham* v. *Robinson*, 2 Durn. & East 282; *Eckhardt* v. *Wilson*, 8 Id. 140; *Browning* v. *Browning*, 29 N. Y. (Supt. Ct.) 547.

16. A discharge in bankruptcy of one

member of a firm under proceedings giving no schedule of partnership debts or assets, and not praying for a discharge from such liabilities, does not relieve the bankrupt from liability for partnership debts: *Poillon* v. *Lawrence*, 77 N. Y. 207; *Corey* v. *Perry*, 67 Me. 140; *Lindsey* v. *Corkery*, 29 Gratt. 650.

17. It has been held that where one partner turns over the assets of the firm to his co-partner, and retires, the continuing partner assuming and agreeing to pay all the debts, and creditors are notified of such arrangement, the liability of the retiring partner is changed from that of a principal to that of a surety, and he is released from all liability if the creditor grants an extension of time to the principal without the assent of the surety: *Smith* v. *Shelden*, 35 Mich. 42; s. c. 16 Am. Law Reg. (N. S.) 292; *Millerd* v. *Thorn*, 56 N. Y. 402; *Harris* v. *Lindsay*, 4 Wash. C. C. 271. See *McNeal's Adm'r* v. *Blackburn*, 7 Dana 170; *Stone* v. *Chamberlain*, 20 Geo. 259; *Oakeley* v. *Pashell*, 4 Cl. & Fin. 207; s. c. 10 Bligh's New Parl. R. 548; *Evans* v. *Drummond*, 4 Esp. 90; *Conwell* v. *McCowan*, 81 Ill. 286. *Per contra: Maingay* v. *Lewis*, Irish R. Com. Law 495 (1869).

The doctrine does not apply, of course, where the creditor expressly reserves his right against the other partner: *Bedford* v. *Deakin*, 2 B. & Ald. 210.

In *Colgrove* v. *Tallman*, 67 N. Y. 85, it was held that where the joint creditor had knowledge that one partner had assumed the debts, and where he was requested by the retiring partner to collect his claim and neglected to do so, the principal thereafter becoming insolvent, the retiring partner was thereby discharged.

18. A release of one of two p rtners with a proviso that it should not prejudice releasor's claim against the other partner, does not discharge the latter: *Solby* v. *Forbes*, 6 E. C. L. R. 11; *Thompson* v. *Lack*, 54 Id. 540; *Greenwald* v. *Kaster*, 85 Penn. St. 46. In this last case it is said: "The rule that a release of one joint obligor or promissor operates as a release of his co-obligors or promissors has long been confined to technical releases, and these by means of recitals may be limited to one alone."

19. As partnership creditors have a preference over individual creditors on the partnership assets, the question arises whether the individual creditors have a like preference on the separate estate. There has been a difference of opinion upon this question. In some cases the right has been doubted and in others expressly denied: *Wisham* v. *Lippincott*, 1 Stock. (N. J.) 353; *Morris* v. *Morris*, 4 Gratt. 293; *Higgins* v. *Rector*, 47 Tex. 361; *Cleghorn* v. *Ins. Bank of Columbus*, 9 Ga. 319; *Camp* v. *Grant*, 21 Conn. 41, 60; *Bardwell* v. *Perry*, 19 Vermont 292.

But the general rule is that announced in the particular case, that firm creditors have in equity a prior claim upon the partnership property, and the separate creditors a like preference upon the separate property, with a right in the creditors of one class to share in any surplus which may remain after the creditors of the other class have been satisfied. This rule is sustained by the great weight of authority: *Toombs* v. *Hill*, 28 Ga. 371; *Thornton* v. *Bussey*, 27 Id. 302; *Matlock* v. *Matlock*, 5 Ind. 403; *Holland* v. *Fuller*, 13 Id. 195; *Union Nat. Bank* v. *Bank of Commerce*, 94 Ill. 271; *Rainey* v. *Nance*, 54 Ill. 209; *Morrison* v. *Kurtz*, 15 Id. 196; *Ladd* v. *Griswold*, 4 Gilm. 25; *Gillaspy* v. *Peck*, 46 Iowa 462; *McCulloh* v. *Dashiell*, 1 H. & Gill 99; *Irby* v. *Graham*, 46 Miss. 427; *Kirby* v. *Shoonmaker*, 3 Barb. Ch. 49; *Wilder* v. *Keeler*, 3 Paige 167; *Morgan* v. *Skidmore*, 55 Barb. 263; *In the Matter of Rieser*, 26 N. Y. (Sup. Ct.) 202; *Rodgers* v. *Meranda*, 7 Ohio St. 179; *Brock* v. *Bateman*, 25 Ohio St. 609; *McCormack's Appeal*, 55 Penn. St. 252; *Black's Appeal*, 44 Id. 503; *Penning-*

ton v. *Bell*, 4 Sneed. 200; *Jackson Ins. Co.* v. *Partee*, 9 Heisk. 298; *Tillinghast* v. *Champlin*, 4 R. I. 173, 190; *Woddrop* v. *Price*, 3 Dess. 207; *Hall* v. *Hall*, 2 McCord's Ch. 302; *South Boston Iron Co.* v. *Holmes*, 4 Cliff. 343; *Murrill* v. *Neill*, 8 How. (U. S.) 414. The New Jersey cases, in support of the rule, are collected in the particular case. The principle was established in Massachusetts by statute in 1838. See *Howe* v. *Lawrence*, 9 Cush. 555. In Kentucky, the rule is not adopted in its entirety, but the principle there laid down by the courts is that the per cent. derived from the firm assets should be ascertained, and individual creditors to the same extent should be allowed an exclusive compensation out of individual assets, and that then an equal pro rata should be allowed to both: *Northern Bank* v. *Keizer*, 2 Duval 169; *Whitehead* v. *Chadwell*, 2 Id. 432. The right of individual creditors to a preference on the individual or separate estate is also asserted in *Holton* v. *Holton*, 40 N. H. 77; *Bowker* v. *Smith*, 48 Id. 120; *Miller* v. *Clarke*, 37 Iowa 325; *Moline Co.* v. *Webster*, 26 Ill. 233.

But that the rule laid down in the particular case does not apply where there is no joint fund and no solvent partner, seems to be equally well settled: *Ex parte Sadler*, 15 Vesey 52; *Janson's Case*, 3 Madd. 229; *Peake's Case*, 2 Rose 54 and note; *Pahlman* v. *Graves*, 26 Ill. 405; *Brock* v. *Bateman*, 25 Ohio St. 609; s. c., 15 Am. Law Reg. (N. S.) 214; *Smith* v. *Mallory*, 24 Ala. 628; *Daniel* v. *Townsend*, 21 Ga. 155; *Higgins* v. *Rector*, 47 Texas 361; *In re Downing*, 2 Dillon 136; *In re Knight*, 2 Bissell 518; *In re McEwen*, 6 Id. 294. But the Massachusetts court in *Howe* v. *Lawrence*, 9 Cush. 555, says that under the statute the rule is applicable in that state even though there is no joint estate and no silent partner. In *Weyer* v. *Thornburgh*, 15 Ind. 124, the rule was also said to be applicable even though there were no joint assets.

20. Partnership goods may, however, be levied upon to satisfy the separate debt of one of the partners: *Weaver* v. *Ashcroft*, 50 Texas 427; *White* v. *Woodward*, 8 B. Mon. 485.

(*a*) The sheriff should levy on the interest of that partner in the partnership estate, he may also take possession of the entire property, and if he only sells the interest of the partner against whom the judgment was rendered, he is not liable in damages to the other partner: *Clark* v. *Cushing*, 52 Cal. 617; *Davis* v. *White*, 1 Houston 228; *Moore* v. *Sample*, 3 Ala. 319; *Stevens* v. *Stevens*, 39 Conn. 474, 480; *Saunders* v. *Bartlett*, 12 Heisk. 316; *Newhall* v. *Buckingham*, 14 Ill. 405; *Moore* v. *Pennell*, 52 Me. 162; *Atkins* v. *Saxton*, 77 N. Y. 195.

(*b*) But if the sheriff, instead of levying on the debtor's interest, levies upon and seizes the partnership property as the sole property of the debtor partner, he becomes a trespasser, and is liable as such: *Atkins* v. *Saxton*, 77 N. Y. 195.

(*c*) One purchasing at sheriff's sale the interest of one partner in the partnership property, does not acquire a right superior to the rights of the copartner or of the joint-creditors, but he takes whatever interest remains in the debtor partner after the payment of the partnership debts: *Chandler* v. *Lincoln*, 52 Ill. 74; *Rainey* v. *Nance*, 54 Id. 29; *Ross* v. *Henderson*, 77 N. C. 173; *Doe* v. *Hunt*, 11 Ired. 42; *Andrews* v. *Keith*, 34 Ala. 722; *Wilson* v. *Strobach*, 59 Id. 492; *Donnellan* v. *Hardy*, 57 Ind. 393.

(*d*) The right of one so purchasing is the right to an accounting and to share in the surplus belonging to the debtor partner: *Morss* v. *Gleason*, 64 N. Y. 204.

21. Where judgment is recovered against one partner on his individual debt, and execution issues, a levy being made on his interest in the partnership, but before the sale executions issue against the same property on judgments against the firm for firm debts, the latter executions have priority: *Ryder* v. *Gil-*

bert, 23 N. Y. (Sup. Ct.) 164; *Eighth Nat. Bank* v. *Fitch*, 49 Id. 595; *Minor* v. *Pierce*, 38 Vt. 610; *Coover's Appeal*, 29 Penn. St. 9; *Trowbridge* v. *Cushman*, 24 Pick. 310.

(*a*) And an attachment of partnership property for a partnership debt, prevails over a prior attachment of the same property for the separate debt of one of the partners: *Pierce* v. *Jackson*, 6 Mass. 242; *Fargo & Co.* v. *Ames*, 45 Iowa 492; *Cox* v. *Russell*, 44 Id. 560; *Howell* v. *Commercial Bank*, 5 Bush 101; *O'Bannon* v. *Miller*, 4 Id. 25.

(*b*) But it has been held that, where in a suit against copartners the separate property of either partner is attached, the lien thus acquired is not discharged or impaired by the subsequent attachment of the same property by the separate creditor of the same partner: *Allen* v. *Wells*, 22 Pick. 450; *Newman* v. *Bagley*, 16 Id. 570; *Stevens* v. *Perry*, 113 Mass. 380. A contrary view has been taken of the matter in New Hampshire. See *Jarvis* v. *Brooks*, 23 N. H. 136; *Crockett* v. *Crain*, 33 Id. 550.

(*c*) The preference which the law gives the creditors of a partnership will be protected in proceedings of garnishment by firm and individual creditors: *Switzer* v. *Smith*, 35 Iowa 269. In *Sheedy* v. *Second Nat. Bank*, 62 Mo. 17, it is held that, in attachment against an individual a person is not liable to garnishment who is indebted to the firm of which he is a member.

22. A firm debt cannot be set off against a debt due from one of the partners: *Houston* v. *Brown*, 23 Ark. 333; *Sager* v. *Tupper*, 38 Mich. 258; *Weil* v. *Jones*, 70 Mo. 560. In *Chamberlain* v. *Stewart*, 6 Dana 32, it is held that partners may set off a debt due to the firm by an insolvent debtor against one due to the latter by one of the partners. In *Johnson* v. *Kaiser*, 40 N. J. Law 286, it is held that a surviving partner in an action against himself to recover a debt which he individually incurred, may set off a claim due to the firm. In *Jones* v. *Blair*, 57 Ala. 458, it is held that a firm debt cannot be set off against a debt due from one of the partners, even with the consent of his copartners, as a set off to be available must be owned by the defendant in his own absolute right at the time suit was brought.

23. And an individual debt cannot be set off against a debt due to the firm: *Harlow* v. *Rosser*, 28 Ga. 219; *Collier* v. *Dyer*, 27 Ark. 478; *Meeker* v. *Thompson*, 43 Conn. 77. In *Montz* v. *Morris*, 89 Penn. St. 392, it is held, however, that such off-set may be allowed with the consent of copartners.

24. A new partner is not liable for the debts of the old firm, unless he expressly agrees to assume them: *Shamburg* v. *Ruggles*, 83 Penn. St. 148; *Kountz* v. *Holthouse*, 85 Id. 235; *Fagan* v. *Long*, 30 Mo. 222; *Gauss* v. *Hobbs*, 18 Kans. 504; *Piano Co.* v. *Bernard*, 2 B. J. Lea 358; *Parmalee* v. *Wiggenhorn*, 6 Neb. 322.

25. A retiring partner is liable, in absence of actual notice, to those who have had prior dealings with the firm: *Holtgreve* v. *Wintker*, 85 Ill. 470; *Haynes* v. *Carter*, 12 Heisk. 7; *Austin* v. *Holland*, 69 N. Y. 571; *Howell* v. *Adams*, 68 Id. 314; *Kenney* v. *Altvater*, 77 Penn. St. 34; *Polk* v. *Oliver*, 56 Miss. 566; *Dickinson* v. *Dickinson*, 25 Gratt. 321; *Kennedy* v. *Bohannon*, 11 B. Mon. 119; *Lovejoy* v. *Spafford*, 93 U. S. 430.

26. The common law did not admit of partnerships with restricted liability, and statutes authorizing limited partnerships must be substantially complied with, or those who associate under it, will be liable as general partners: *Van Ingen* v. *Whitman*, 62 N. Y. 513; *Smith* v. *Argall*, 6 Hill 479; s. c., 3 Denio 435; *Bowen* v. *Argall*, 24 Wend. 496; *Richardson* v. *Hogg*, 38 Penn. St. 153; *Andrews* v. *Schott*, 10 Id. 47; *Henkel* v. *Heyman*, 91 Ill. 101.

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